IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Appeal from Order No.477 of 2007.

1. Smt.Asha Dinesh Dalvi
2. Shri Ganesh Dinesh Dalvi
3. Shri Rajesh Kanhooa Dalvi
4. Shri Kisan Pandu Wadhan
5. Smt. Anusaya Kisan Choudhari ..Appellant

versus

M/s. Kapoor Builders
through its partners
i) Shri Bhavanji Mehgi Vora
ii)Shri Champalal D. Shah ..Respondent.

Mr. Kuldeep Patil for the Appellant

Mr. S.A.Abhyankar for the respondents

Coram : S.R.Sathe, J.
Dated : 9th August, 2007

P.C.

1. Appeal heard finally at admission stage.

2. Appellants, original defendants have preferred this appeal against the order passed below Exhibit 5 in Civil Suit No.195 of 2006 whereby the plaintiff's application for temporary injunction restraining the defendants from disturbing the plaintiffs possession of the suit land bearing Survey No.91 Hissa No.5/2 admeasuring about 54.5 Ares and Survey No.91 Hissa No.6 admeasuring 6.3 Ares situated at Valiv, Taluka Vasai, Dist: Thane

was allowed. For the sake of convenience hereafter the parties shall be referred to as plaintiffs and defendants.

3. Brief facts giving rise to this appeal are as under:

. The suit land mentioned above was originally owned by deceased Ambibai Dadu Dalvi. She leased out the suit land to plaintiff on 9.11.1981 for a period of 99 years and accordingly executed necessary lease deed showing therein herself as of Hindu-Aagri Caste. After the death of Ambibai the defendants got the lease deed cancelled from Tahsildar Vasai on the ground that the defendants are Adivasis. Thereafter, plaintiff showed willingness to purchase the said land from defendants and defendants executed an Agreement to Sale dated 10.6.2005 in favour of plaintiffs and agreed to sale the suit land for Rs.25,00,000/- after accepting earnest amount of Rs.2,00,000/-. Plaintiffs were all along ready and willing to purchase the suit land by performing their part of contract, but defendants failed to execute the sale deed. Hence, plaintiffs filed the present suit for

specific performance of agreement to sale and also prayed for permanent injunction restraining defendants from obstructing plaintiffs possession of the suit land and restraining them from creating any third party interest.

4. Plaintiffs also filed application Exhibit 5 for temporary injunction restraining defendants from disposing of the suit land and obstructing plaintiffs possession till disposal of the suit.

6. The defendants filed their say and opposed the application. They denied that they had agreed to sale the suit land to plaintiffs. They also denied that the alleged agreement to sale is legal and valid. According to them, they being Adivasis prior permission of the concerned revenue authority was necessary before entering into any agreement to sale. The defendants, therefore, prayed that plaintiffs are not entitled to purchase the suit land. Hence, on these grounds the defendants prayed that plaintiff’s application for temporary injunction be dismissed.

7. After hearing the arguments advanced by the learned advocates on both sides and after considering the documents produced on record, the learned trial Judge came to the conclusion that the defendants had agreed to sale the suit land to plaintiff and they were put in possession of the same and plaintiffs have paid about Rs.7,00,000/- to the defendants. He, therefore, held that the plaintiff has made out a prima facie case for granting temporary injunction and balance of convenience is also in plaintiff's favour. He, therefore, allowed the application.

8. Being aggrieved by the said order the defendants have filed the present appeal. In this appeal before me Shri Kuldeep Patil, learned Advocate for the defendants has urged only two points. Firstly, he submitted that the agreement in question is not legal and valid in view of the provisions of Section 36 & 36A of the Maharashtra Land Revenue Code, so, no relief based on the said agreement can be granted to plaintiffs. Secondly, he canvassed before me that the defendants are Adivasis. They are only having the suit property, no other land is owned by them and if temporary

injunction as prayed is granted, the defendants would suffer irreparable loss. He, therefore submitted that the appeal be allowed and the order passed by the learned trial Judge be set aside.

9. As against this, the learned advocate for the respondent supported the judgment and order passed by the learned trial Judge.

10. From the material on record, it does appear that the defendants have executed an agreement to sale in favour of plaintiffs. No only that, but the defendants have received the amount of Rs.2,00,000/- by way of earnest money and subsequently they have received Rs.5,00,000/-. The agreement to sale shows that the possession of the land is also with the plaintiffs. So, prima facie the plaintiffs have shown their possession of the suit land.

11. The main plank of the argument of the learned advocate for the defendants was that the suit agreement is bad in law in view of the provisions of Section 36 and 36A of the Maharashtra Land Revenue Code. It is therefore necessary to see the relevant provisions:

Section 36: Occupancy to be transferable and heritable subject to certain restrictions:

(1) An occupancy shall, subject to the provisions contained in Section 72 and to any conditions lawfully annexed to the tenure, and save as otherwise provided by law, be deemed an heritable and transferable property.

(2) Notwithstanding anything contained in the foregoing sub-section occupancies of persons belonging to the Scheduled Tribes (hereinafter referred to as the "Tribals") (being occpancies wherever situated in the State.) shall not be transferred except with the previous sanction of the Collector.

. Provided that nothing in his sub-section shall apply to transfer of occupancies made in favour of persons other than the Tribals (hereinafter referred to as the "non-Tribals') on or after the commencement of the Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974.

Section 36A. Restrictions on transfers of occupancies by Tribals:-(1) Notwithstanding anything contained in the sub-section (1) of Section 36, no occupancy of a tribal shall, after the commencement of Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974 be transferred in favour of any non tribal by way of sale (including sales in execution of a decree of a Civil Court or an award or order of any Tribunal or Authority, gift, exchange, mortgage, lease or otherwise except on the application of such non triable and except with the previous sanction.

12. It must be noted that in the agreement to sale, the defendants themselves have stated that

they will obtain the necessary permission from the concerned authority for sale of the land. So, once they had undertaken the said responsibility and accepted the earnest money, and thereafter the additional amount, from the plaintiffs, now they are in fact not entitled to oppose the plaintiffs claim on the ground that the agreement in question is against the provisions of Section 36 and 36A of the Maharashtra Land Revenue Code. So, this only shows the dishonest intention of the defendants. When they were aware that they are adivasis and as such prior permission from the concerned authority is required, they should not have in fact entered into an agreement to sale. It must also be noted that as it is, there is no prima facie evidence to show that the defendants are Adivasis, because in the lease deed the predecessor of defendants is described as Hindu Aagri, but there is no caste certificate on record. Besides this, it must be noted that as it is, sale deed is not executed. What is prohibited is to execute the sale deed and transfer the land. So, at this stage even if there is no permission as contemplated under the above mentioned provisions, it cannot be said that the plaintiff is not entitled to get the discretionary relief of temporary

injunction particularly when it appears that the plaintiff is in possession of the suit land.

13. The plaintiff has parted with huge amount, so if temporary injunction as prayed for is not granted then certainly irreparable loss will be caused to the plaintiff.

14. In view of the above, I think that the learned trial Judge has considered all the aspects of the matter and has rightly granted the discretionary relief of temporary injunction in favour of plaintiffs. There is absolutely nothing on record to show that the order passed by the learned trial Judge is illegal or arbitrary. So, there is no necessity to interfere with the said order in the present appeal.

15. Hence, the A.O is dismissed.

(S.R.Sathe, J.)